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## The winds in New York have not changed after the recent ICJ elections

KANAD BAGCHI — LOVISH GARG — 13 December, 2017



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Inflamed passions, relentless rallying and 11 voting sessions hence, the International Court of Justice (ICJ/World Court/Court) was finally made complete. Contrary to previous occasions characterizing the Court's history, 'completeness' this time around meant something hitherto inconceivable. With the UK's withdrawal of Justice Greenwood from the Court's candidacy after repeatedly being trumped over by India's Justice Bhandari, the ICJ will function without a judge drawn from a permanent member of the Security Council (SC). A great many propositions have emerged after the elections, most of which Richard Doren in

his contribution to this blog titled “Wind Of Change in New York?” has very succinctly detailed. Underpinning the present election Richard notes, lies a deep seated resentment towards the Permanent Five (P5) because of its entrenched privileges, a severe diplomatic blow to the United Kingdom and as other commentators have additionally put, perhaps a rebalancing of power relations characterizing a new world order. Surely, it is a captivating narrative of a realization which great many nations within the United Nations (UN) are eager to embrace. We are however, less jubilant and far more skeptical regarding the significance of the unfolding events. To our mind, once the dust has settled, the old structures within the UN system will appear as entrenched as ever. Moreover, looking beyond our binary fixation of a North-South divide, it will be apparent that the international justice system comes out the most battered, especially with respect to its independence and impartiality.

### **Towards a New World Order? Not Quite Yet!**

While retaining a seat at the World Court is perhaps a remarkable diplomatic victory, however postulating from those circumstances, a re-balancing of world order is naïve and nearsighted. Not only do the most potent institutions of authority in the international realm continue to be dominated by select countries but the political, security, financial and judicial dimensions of global order continues to retain the ideological preferences and practices of the west. Despite continuing efforts towards a reform of the SC, the institution remains guarded regarding its entitlements- the power of ‘veto’ being the epitome of such absolutism. The examples of Palestine and Taiwan reflect that even on questions as profound as that of statehood, the power of a

single 'veto' hangs over the right to self-determination of millions of people. In recent years, issues of international peace and security have similarly witnessed significant inaction owing to the political dispensation of a few members, reflected more recently from the inability of the international community to intervene in Syria due to the relentless exercise of 'veto' by the P5. In similar vein, structures underpinning the world economy and the institutions of global economic governance continue to be disproportionality tilted in favor of the industrialized West.

Even in the judicial realm, the west not only continues to retain its preferences but has selectively utilized modes of international adjudication to perpetuate its own interests. Even in the present elections to the ICJ- the assumed permanency of P5 members on the Court's bench did not have the backing of any text but was merely the product of an accepted convention recognizing a combination of geopolitical status and power hierarchy engulfing the international order. At a time when the western powers have destroyed countries in their military adventurism, only leaders from the Third World are prosecuted at the International Criminal Court- which many now despise as a tool of Western imperialism. Further, history is ripe with instances where the P5 have either effectively absolved themselves of jurisdiction of the international court or simply declined to adhere to the Court's ruling when, in their view, it infringed their sovereignty or security interests. Lest we forget, it is the SC alone which has the mandate to implement, through coercive measures if necessary, the decisions of the Court thereby assuming unbridled powers to renege with impunity.

That said however, it is not our intention to suggest that instances such as the present one are absolutely without significance. Indeed, one could argue that the ouster of a P5 member on the ICJ represents a definitive break from the past, a past that demonstrated and was reluctantly accepted as inclined towards the hegemony of the west. If anything, it goes to show that through closer coordination and cooperation the Global South can transform into a real agenda setter within the international order. Nonetheless, we fear that the vision for a more equitable world order can dissipate effortlessly in the face of trivial symbolism and triumph. Previous instances reflect that coordination and cooperation within the Global South remains ad-hoc and piecemeal and instances where it takes a permanent shape promptly lose both vision and effectiveness. The BRICS, including its allied institutions of money and finance, best represents how the potentiality of real contestation against an established order can quickly lose steam because of inherent conflict among its members and thus fail to produce any meaningful alternative to the existing patterns of world power. Coordination has never been either easy or predictable, especially in matters where the stakes are higher, issues more politically charged and nature of commitments required more demanding. In this regard, although we do not contend that diplomacy is a zero-sum-game, it nonetheless begs the question, how best, in which direction and with what intensity one ought to expend efforts in realizing a certain vision. The Indian government choose to effectuate its own considered vision and secure a place at the ICJ, however, whether it signifies 'winds of change', we submit, is doubtful and far-fetched.

### **Who Really Wins? The legitimacy perils of a politicised court**

Amidst our propensity to view international contestations through a binary lens, we often lose sight of its larger implications for the international order. Viewed through that perspective, perhaps the most important question to ask is this: what does the changed composition in the World Court really mean for international justice system? While the ousting of a P5 member does renew the prospects for having a more representational and less prejudicial Court, however we believe that a mere representational correction is not sufficient to ward off criticisms of bias and partiality from the World Court. The very process of election and re-elections of judges to the ICJ represents the biggest threat to the impartiality and independence of the Court. Invariably we witness how elections and particularly re-elections to the ICJ turn into an ugly ball-game of diplomacy, with States championing for their candidate through both financial and ideational resources. Therefore, it becomes imperative for the candidate to secure both trust and support of his/her own government. The dangers underpinning the nexus between a candidate and his/her government have been variously captured in legal scholarship and suffice it to say that 'nationality' bias runs deep within the decision making structures of the ICJ and the proposition that government patronage and ICJ appointment run proportional to each other remain accepted. In this regard, the re-election of Justice Bhandari also does not effuse much confidence. Readers will remember that during the pendency of perhaps one of the most contentious matters between India and Pakistan, the Jadhav Case, Justice Bhandari thought fit to publicly express his satisfaction at the Court's interim order, after having himself written an elaborately detailed 'declaration' on the case. While it is no one's case that a single remark makes a particular judge's disposition

definitive, one cannot also entirely ignore the manifestations of a certain inclination, and certainly not the appropriateness of such a move. Additionally, the propriety of initially nominating Justice Bhandari in 2012 itself remains hotly debated in India, both on account of his transient experience and expertise in international law and the effect of the nomination on the independence and impartiality of the Indian judiciary.

The nexus of influence, pressure and power-proximity is deeply entrenched in the global order and in the case of the ICJ, begins squarely from the nomination stages, where perhaps proximity to government becomes a determinate of 'competence in international law' and extends all the way to the ballot process, and where diplomatic pressure and political resources dictate the casting of votes: merit and competence often comes in as a distant second in both the instances. Several scholars have therefore made a case for infusing more transparency which would not only ensure improved accountability but also minimize political discretion of states to a certain extent. This can begin at the nomination stage for example by 'issuing public and open calls for candidates' as mandated by the parliamentary assembly under ECHR for election of judges to the Strasbourg court. Further, for better geographical representation, a bar on immediate re-election of a country, similar to other elected bodies of the UN can be introduced. This will also ensure that the seats at the World Court are distributed in a more equitable manner and not always held by powerful and wealthier nations as history suggests. Although characterized as the triumph of the Third World over the Global North, this triennial election, in our view, is not indicative of a catalyst fueling a rebellion and if anything,

has only portrayed the reality of power politics threatening the legitimacy of the World Court.

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